

# Prevent Organizational Conflicts of Interest from Becoming Last-Minute Showstoppers

BY SARAH M. MCWILLIAMS

By aggressively working to identify and assess OCIs up front, and proposing comprehensive and thoughtful mitigation strategies where feasible, contractors can dramatically reduce the odds of having a proposal rejected on OCI grounds.



## The December 2007 issue of *Contract Management* featured the article, “Identifying Latent Organizational Conflicts of Interest: A 12-Step Program.”

The article proposed strategies for federal acquisition professionals to use in detecting latent organizational conflicts of interest (OCIs), thereby promoting more effective management of OCIs. Contractors also have a significant role to play in this process, as well as a significant interest in surfacing OCIs early in the acquisition cycle, when alternatives for resolution are at their most flexible.

No contractor, after investing substantial resources in a major proposal and negotiations, wants to have its proposal rejected on the basis of a tardily identified OCI. Equally bad is the prospect of receiving a contract award and beginning performance, only to have the contract terminated when a protesting competitor uncovers previously overlooked OCIs. By aggressively working to identify and assess OCIs up front, and proposing comprehensive and thoughtful mitigation strategies where feasible, contractors can dramatically reduce the odds of having a proposal rejected on OCI grounds.

### » Select business opportunities with an eye toward OCI issues.

The Government Accountability Office (GAO) still cleaves to the principle that some OCIs are simply too pervasive to be mitigated.<sup>1</sup> The GAO also underscores that the government’s discretion in addressing OCIs is circumscribed only by the broad principle of “reasonableness,”<sup>2</sup> thus preserving the government’s option to deal with substantial OCIs simply by disqualifying the conflicted firm’s offer.<sup>3</sup> Accordingly, contractors are

well advised to consider OCI potential in choosing solicitations to target; and to think twice before expending significant costs on proposal efforts whose performance would create pervasive OCIs.

### » Don’t forget restrictive clauses included in earlier contracts.

Contractors should also be mindful of the government’s increasing use of restrictive clauses (such as those outlined in the *Federal Acquisition Regulation*, Part 9.507 and subparts); and understand that they may already have agreed, in earlier contracts, to forfeit the right to be considered for award of certain related efforts. Because these restrictive clauses can automatically bar a contractor from being considered for award of a later contract, contractors should keep careful track of these restrictions; and should institute reliable means of ensuring that they are duly considered as part of the process of selecting solicitations to pursue. Otherwise, the contractor may find itself in the unpleasant position of having incurred substantial costs to prepare a proposal that is never even read, much less evaluated, by the government.

### » Openly acknowledge and address OCI issues in proposals for requirements with identified OCI potential.

Contractors have little to gain by glossing over known OCIs in hopes that those OCIs will remain undetected. Even in the event that OCIs are not fully identified by the government in the evaluation and selection process, competing contractors are quick to make the connection and protest a suspect award. Further, even if an OCI remains undiscovered until well after award, it can trigger significant unanticipated costs and administrative burdens when it inevitably comes to light. In a worst-case scenario, unanticipated OCIs can seriously change the profit/loss assumptions attending a particular contract. Better instead to squarely and thoroughly identify OCIs in your proposal at the outset—and to couple that discussion

with comprehensive strategies to avoid, prevent, or mitigate each OCI identified. This will not only facilitate review, but will assist the government in generating and documenting a defensible OCI analysis should your proposal be selected for award and the award subsequently protested.

### » Be proactive in supervising ongoing contracts that may create OCIs.

Contractors—especially those that have multiple divisions or affiliates—should monitor ongoing specific efforts supported under contracts for technical assistance and engineering support. Most importantly, contractor employees who are embedded in a government program office should be advised to coordinate with the contractor’s compliance officers *before* beginning work on new government tasks to develop specifications, statements of work, source selection plans, cost estimates, or other acquisition-related documents pertaining to an upcoming competitive acquisition.

### » Include information regarding affiliates in your proposal.

Many OCIs are generated by contractor corporate affiliations that are simply unknown to the government. Therefore, contractors can help by ensuring that proposals as submitted contain a current organization chart, identifying all corporate and other affiliates that share an identity of interests for OCI purposes. In the event affiliations change while an acquisition is pending, contractors should submit supplemental information describing the change and updating this portion of their proposals.

### » Avoid one-size-fits-all solutions for bias-type OCIs.

One of the biggest mistakes contractors make in addressing OCIs is relying solely on “firewall” arrangements providing for security of information within a contractor’s organization. Firewalls, properly constructed, are generally deemed sufficient

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to mitigate “informational” OCIs—i.e., those OCIs that arise solely through the contractor’s access to nonpublic information (usually in the form of another contractor’s proprietary data).

In contrast, however, firewalls are virtually irrelevant to mitigation of bias-type OCIs—where the contractor, due to a combination of past, present, or proposed contractual obligations, would be required to undertake multiple inconsistent roles, and where the results would compromise a contractor’s judgment or confer an unfair advantage.<sup>4</sup> Where an acquisition presents a known bias-type OCI, contractors are well advised to conduct their analysis on a case-by-case basis; and formulate specifically-tailored

OCIs, use of standard “firewalls” to assure “organizational, physical, and electronic separation”<sup>7</sup> of OCI-sensitive information from the contractor’s overall organization is effective, and moreover, economical. Once a comprehensive and effective firewall plan is established, it is highly portable to different contracts with a minimum of tailoring.

### » Consider and identify OCI implications of mergers and acquisitions.

For a government contractor considering acquisition of a new subsidiary or affiliate, OCI implications are a critical ingredient of the business analysis. Consider the case of

be detailed to the government in seeking required consent to novation under FAR Subpart 42.12. **CM**

#### ABOUT THE AUTHOR

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Even in the event that OCIs are not fully detected by the government in the evaluation and selection process, competing contractors are quick to make the connection and protest a suspect award.

mitigation procedures that provide for the contractor’s *de facto*<sup>5</sup> or *de jure*<sup>6</sup> recusal from the conflicted work.

### » Formulate and adopt a standard firewall protocol to address informational OCIs.

While contractors often rely unduly on “canned” mitigation plans that do not fully address the specific OCI problems raised by a particular acquisition, standard plans are useful in one area—addressing informational OCIs. For these particular

Company X, a defense hardware producer, who is thinking of acquiring an engineering services affiliate. If the would-be affiliate is currently supporting testing and evaluation of Company X’s products under multiple government contracts, the acquisition is likely to create OCIs that might interfere with performance on both ends, and is likely to be costly to mitigate.

Contractors should realistically consider the hidden business and opportunity costs of OCIs before entering into affiliations. Further, OCI analysis—and proposed measures to avoid or mitigate the OCIs—should

#### ENDNOTES

1. See, e.g., *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, 95-2 CPD Para. 129 at 33 (Jul. 27, 1995).
2. See *Business Consulting Associates, LLC*, B-299758.2, \_\_ CPD Para. \_\_ at 20, 2007 Comp. Gen. LEXIS 133 at 9 (Aug. 1, 2007).
3. Authority to withhold award on OCI grounds in appropriate cases is expressly addressed in Federal Acquisition Regulation (FAR) 9.504(e).
4. *The LEADS Corp.*, B-292465, 2003 CPD Para. 197 at 12 (Sep. 26, 2003); see also *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, 95-2 CPD Para. 129 at 31 (Jul. 27, 1995) and *Jones-Hill Joint Venture*, B-286194.4, B-286194.5, B-286194.6, 2001 CPD Para. 194 (Dec. 5, 2001), aff’d on reconsideration, *Department of the Navy – Reconsideration*, B-286194.7, 2002 CPD Para. 76 (May 29, 2002).
5. See *The LEADS Corp.*, supra, 2003 CPD Para. 197 at 12 (Sep. 26, 2003) (GAO upholds mitigation plan requiring contractor employees supporting federal acquisition functions to recuse themselves in advance from acquisitions in which their contractor employer had an interest).
6. See *Deutsche Bank*, B-289111, 2001 CPD Para. 210 (Dec. 12, 2001) at 2 (GAO approves use of “walled subcontractors” for performance of conflicted work, where prime contractor had a demonstrated Bias-type OCI).
7. See *The LEADS Corp.*, B-292465, 2003 CPD Para. 197 at 12 (Sep. 26, 2003).